Jayakumar a/l Karuppanan & Anor v Jeyakumar Krishnan

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S8–24–1794 OF 2004
FAIZA TAMBY CHIK J
2 FEBRUARY 2005

Civil Procedure — Action — Res judicata — Whether doctrine of res judicata will apply for new suit with new parties and new circumstances

Family Law — Children — Custodianship — 7 years old child — Whether interest of child and parent should be considered — Law Reform (Marriage and Divorce) Act 1976 s 88(2) —

Family Law — Children — Custodianship — 7 years old child — Whether child should be interviewed to ascertain his wishes — Whether child should be forced to stay with a party which he does not wish to stay with

Family Law — Children — Custodianship — Welfare report — Whether appropriate for court to make custody decision in absence of welfare report when it had been requested for

The current suit is a custody suit of a child called Pravin between the plaintiffs (the child's maternal aunt and husband) and defendant (child's father). The mother of the child one Gomathy died on 10 June 2001 of astroctoma. Pravin spent all his life with his maternal family. After delivering Pravin, Gomathy returned to her parent's home (two days after the birth of the child) in line with Hindu custom. Gomathy had been abused and was placed in financial hardship by the defendant (Pravin's father). After Pravin's birth, Pravin's father seldom visited his then wife or the child. Since Gomathy's illness, Pravin's father insisted that Gomathy continue staying in her family home. Pravin's father had not provided for this wife nor the child during that time. Gomathy's family took the sole responsibility of bringing up Pravin and also providing for Gomathy's medical expenses. Then Pravin's father filed a petition for divorce in August 2000 whilst his wife was very ill and her condition deteriorating. When she eventually died on 10 June 2001, Pravin's father did not even have the courtesy to attend her funeral nor bear her funeral expenses. Exactly two months after Gomathy's death, Pravin's father remarried on 11 August 2001. From the time of Gomathy's death to the remarriage, not once did he worry enough about Pravin to want to at least visit the child who had lost his mother. Despite the court order of 21 October 2002 (ie the consent order giving legal custody to Pravin's father and daily care and control of Pravin to the maternal grandparents), Pravin's father did not make even one payment of RM100 per month for his only son Pravin as ordered by the court. In fact, Pravin's father attempted to obtain the monthly

allowance that Pravin was getting from the PERKESO Department as a result of his mother's savings and death. Pravin's father apparently did so by stating that Pravin was living with him. The maternal aunt (second plaintiff) helped to care for Pravin from the time he was born. She subsequently got married on 22 January 1994 to the first plaintiff. Together they have provided for Pravin and taken care of his health, physical, educational and religious needs. In law, the grandparents have been entrusted with the daily care and control of Pravin but in reality, it had been the maternal aunt and uncle who had taken care of this child with the grandparents help. The issue to be determined by the court was whether the order dated 20 May 2004 should be rescinded and the custody be given to the plaintiff's in this matter. Pravin's father also filed an application to strike out the plaintiff's parent application for custody, care and control of Pravin Kumar on the ground of res judicata. There was also a doctor's report on the emotional and psychological effect on Pravin was being forced to live with his father which was not available to the court when it made the earlier order of giving custody to the respondent.

Held, allowing plaintiffs' application:

(1) There is no question of res judicata, for this is a completely new suit with new parties and new circumstances. The earlier suit was between Pravin's father and the maternal grandparents, whereas the present suit is between Pravin's maternal aunt and uncle and Pravin's father (see para 7).

(2) The court should have regard to the parent's wishes and the child's wishes. The operative word 'and' in s 88(2) of the Law Reform (Marriage and Divorce) Act 1976 should be interpreted conjunctively and disjunctively. In the previous custody decision the court did not have the opportunity to consider both the parent's and child's wishes (see para 10).

(3) Pravin would be seven years old on 9 April 2005. The court interviewed Pravin and during the subsequent hearing the court made it clear to Pravin's father that his child did not wish to live with him let alone see him. Pravin had clearly expressed his wishes and he was of an age to express an independent opinion. The child was precise, clear and focused on wanting to live with his maternal aunt and uncle (see para 10).

(4) It was not in Pravin's interest to traumatize him by forcing him to live with someone, albeit that its his own biological father. Love and respect come naturally to a child and should not be forced on him (see para 12).

(5) It was a fact that since birth the child lived with his mother in turn had lived with her family. The child had been a child of the maternal family from birth. This court must have regard to the undesirability of disturbing Pravin's life by changes in the care and control of this child's daily life at this point in his little blessed life. Any such changes would most likely traumatize and psychologically cause massive destruction to his emotions and general progress (see para 13).

(6) Having recognized the importance of the welfare report in this case and having made the decision to request for a welfare report, it was only appropriate that a decision should not be made in the absence of such a report. An independent

welfare officer would assess Pravin in his natural surroundings and with people battling for custody over him, there could not be a better guide than such a report. In considering the welfare of the child, the word 'welfare' connotes a process whereby, all the relevant facts, relationships, claims and wishes of parents, wishes of the child, risks, choices and other circumstances should be taken into account and weighed, the course to be followed in the interests of the child's welfare comes as a matter of course. This valuable information can be obtained with the assistance of a welfare officer's report (see para 14).

[Bahasa Malaysia summary

Guaman semasa adalah satu guaman hak penjagaan kanak-kanak bernama Pravin antara plaintif-plaintif (ibu saudara sebelah ibu kanak-kanak dan suaminya) dan defendan (bapa kanak-kanak). Ibu kanak-kanak bernama Gomathy telah meninggal dunia pada 10 Jun 2001 akibat penyakit astroctoma. Pravin telah seumur hidupnya bersama keluarga sebelah ibunya. Selepas melahirkan Pravin, Gomathy pulang ke rumah ibu bapanya (dua hari selepas melahirkan anak) mengikut adat Hindu. Gomathy telah didera dan berada dalam masalah kewangan yang dibebankan oleh defendan (bapa Pravin). Selepas kelahiran Pravin, bapa Pravin jarang melawat isterinya ataupun anaknya. Sejak Gomathy jatuh sakit, bapa Pravin mendesak Gomathy tinggal di rumah keluarganya. Bapa Pravin tidak membiayai isteri maupun anaknya sepanjang tempoh tersebut. Keluarga Gomathy memikul sepenuhnya tanggungjawab membesarkan Pravin dan juga membayar perbelanjaan perubatan Gomathy. Kemudian bapa Pravin telah memfailkan satu petisyen perceraian dalam bulan Ogos 2000 semasa isterinya sakit tenat dan keadaannya yang merosot. Apabila beliau akhirnya meninggal dunia pada 10 Jun 2001, bapa Pravin tidak langsung menziarahi pengebumiannya mahupun membayar perbelanjaan pengebumiannya. Genap dua bulan selepas kematian Gomathy, bapa Pravin telah berkahwin semula pada 11 Ogos 2001. Daripada masa kematian Gomathy hingga perkahwinan semula itu, tidak sekalipun beliau hirau tentang Pravin bahkan tidak langsung melawat anak yang kehilangan ibu itu. Meskipun terdapat perintah mahkamah bertarikh 21 Oktober 2002 (perintah persetujuan memberikan hak penjagaan sah kepada bapa Pravin dan penjagaan dan kawalan harian terhadap Pravin kepada nenek dan datuk sebelah ibunya), bapa Pravin tidak membuat sebarang pembayaran RM100 setiap bulan untuk satu-satunya anak lelakinya Pravin sebagaimana yang diperintahkan oleh mahkamah. Bahkan, bapa Pravin cuba mendapatkan elaun bulanan yang Pravin peroleh daripada Jabatan PERKESO yang merupakan simpanan dan kematian ibunya. Bapa Pravin berbuat demikian dengan mengatakan bahawa Pravin hidup dengannya. Ibu saudaranya (plaintif kedua) telah menjaga Pravin sejak dilahirkan. Beliau kemudiannya telah berkahwin pada 22 Januari 1994 kepada plaintif pertama. Bersama mereka telah membiayai Pravin dan menjaga keperluan kesihatan, fizikal, pendidikan dan agamanya. Dari segi undang-undang, datuk dan neneknya telah diamanahkan dengan penjagaan dan kawalan harian Pravin tetapi secara realiti, ibu saudara dan suaminya yang telah menjaga anak ini dengan bantuan datuk dan neneknya. Persoalan yang perlu ditentukan oleh mahkamah adalah sama ada perintah bertarikh 20 Mei 2004 patut dibatalkan dan hak penjagaan diberikan kepada plaintif dalam perkara ini. Bapa Pravin juga telah memfailkan satu permohonan untuk membatalkan

permohonan ibu bapa plaintif untuk hak penjagaan Pravin Kumar atas alasan res judicata. Terdapat juga laporan perubatan tentang kesan emosi dan psikologi Pravin kerana dipaksa tinggal dengan bapanya yang tidak dikemukakan ke mahkamah apabila ia membuat perintah terdahulu memberikan hak penjagaan kepada responden.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Tiada persoalan tentang res judicata, kerana ini adalah satu guaman baru dengan pihak-pihak baru dan keadaan baru. Guaman terdahulu antara bapa Pravin dan datuk nenek sebelah ibu, manakala guaman semasa adalah antara ibu saudara sebelah ibu dan bapa saudara Pravin dan bapa Pravin (lihat perenggan 7).

(2) Mahkamah hendaklah mengambil perhatian tentang hasrat ibubapa dan hasrat anak. Perkataan operatif 'and' dalam s 88(2) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 hendaklah ditafsirkan sebagai penghubung dan pengasing. Dalam keputusan hak penjagaan sebelumnya mahkamah tidak berpeluang mempertimbangkan kedua-dua hasrat ibu bapa dan anak (lihat perenggan 10).

(3) Pravin berumur tujuh tahun pada 9 April 2005. Mahkamah telah menemubual dengan Pravin dan semasa perbicaraan berikutnya mahkamah menjelaskan kepada bapa Pravin bahawa anaknya tidak berhasrat untuk tinggal maupun melihatnya. Pravin dengan jelas menyatakan hasratnya dan berdasarkan umurnya beliau boleh menyatakan pendapatnya dengan sendiri. Kanak-kanak itu dengan nyata, jelas dan fokus ingin tinggal bersama ibu saudara sebelah ibunya dan suaminya (lihat perenggan 10).

(4) Bukan dalam kepentingan Pravin untuk menakutkannya dengan memaksanya tinggal dengan seseorang, meskipun ia bapa kandungnya. Kasih sayang dan rasa hormat datang dengan sendirinya untuk seorang kanak-kanak dan tidak patut dipaksa ke atasnya (lihat perenggan 12).

(5) Pada hakikatnya kanak-kanak tersebut sejak lahir telah tinggal dengan ibunya dan seterunya keluarga ibunya. Kanak-kanak itu telah menjadi anak keluarga sebelah ibu sejak lahir. Mahkamah ini hendaklah memikirkan bagaimana hidup Pravin akan terganggu akibat perubahan dalam penjagaan dan kawalan kehidupan harian kanak-kanak ini pada saat ini. Apa-apa perubahan sedemikian akan memberi trauma dan gangguan psikologi terhadap perasaan dan pertumbuhan amnya (lihat perenggan 13).

(6) Setelah mengenalpasti kepentingan laporan kebajikan alam kes ini dan setelah membuat keputusan terhadap permintaan satu laporan kebajikan, ia hanya sesuai agar satu keputusan itu tidak dibuat dengan ketiadaan laporan itu. Seorang pegawai kebajikan akan menilai Pravin dalam persekitaran semula jadinya dan dengan mereka yang menuntut hak penjagaan terhadapnya, tidak ada panduan yang lebih baik untuk laporan sedemikian. Dalam mempertimbangkan kebajikan kanak-kanak, perkataan 'welfare' bermaksud satu proses di mana, semua fakta berkaitan, hubungan, tuntutan dan hasrat ibu bapa, hasrat kanak-kanak, risiko, pilihan dan keadaan lain patut diambilkira

dan diteliti, proses ini harus diikuti demi kepentingan kebajikan kanak-kanak. Maklumat penting boleh diperoleh dengan bantuan laporan pegawai kebajikan (lihat perenggan 14).]

Notes

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 151–152.

Cases referred to

Churchard v Churchard CA (1984) FLR 635 (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189 (refd)
Sivajothi K Suppiah v Kunathasan Chelliah [2000] 6 MLJ 48 (refd)
Tan Chong Pay v Tan Swee Boon [1997] 4 CLJ 625 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88(1), (2), (3), 100

Pushpa Ratnam (Ravi Nekoo with him) (Puspa Ratnam) for the plaintiff.
S Bala (Fadzila with him) (SBS Maniam & Associates) for the defendant.

Faiza Tamby Chik J:

[1] There are three previous proceedings involving Pravin Kumar (not including the present suit before me). They are:

(i) Divorce proceedings Suit No S4–33–861 of 2000 filed at the Kuala Lumpur High Court. The parties were *Jeyakumar Krishnan* (child's father) *v Gomathy a/p Vellamuthian* (child's mother). This suit was eventually withdrawn upon Gomathy's death;

(ii) Originating Summons Suit No S4–24–196 of 2002 filed at the Kuala Lumpur High Court (custody application). The parties were *Jeyakumar Krishnan* (child's father) *v Vellamuthian @ Vellyan a/l Periasamy and Sellamah a/p Sendayan* (child's grandparents). In this application, a consent order was recorded wherein the child's father was given legal custody and the child's grandparents were given daily care and control;

(iii) Originating Summons Suit No S4–24–196 of 2002 filed at Kuala Lumpur High Court (variation of custody application). The parties were *Jeyakumar Krishnan* (child's father) *v Vellamuthian @ Vellayan a/l Periasamy and Sellamah a/p Sadayan* (child's grandparents). In this application custody, care and control of the child was given to the father.

[2] The Originating Summons Suit No S8–24–1794 of 2004 filed at the Kuala Lumpur High Court (custody application) ('the present suit') is between Pariamma a/p Vellamuthian and Jeyakumar a/l T Karuppanan (child's maternal aunt and husband) and Jeyakumar Krishnan (child's father).

A **[3]** Pravin's father and the deceased Gomathy were married on 22 January 1994. The marriage was one with many problems and Gomathy had suffered physical, mental and financial abuses at her husband's hands. Pravin was born on 9 April 1998 and is now six years and eight months old. A happy child with dimples and a permanent smile on his face, he bonds well with his grandparents and maternal **B** uncles and aunts who have taken on the task of nurturing him in all important aspects of his life since he was born. Pravin spent all his life with his maternal family. After delivering Pravin, Gomathy returned to her parent's home on 11 April 1998 (two days after the birth of the child) in line with Hindu custom. A month later she was diagnosed with 'lower spinal cord tumor (astroctoma)' and was not able to walk comfortably. Despite being operated at Pantai Medical Centre her condition was **C** permanent and progressive with no possible cure. She became a paraplegic. Her slow deterioration led to her eventual death on 10 June 2001 when Pravin was a young child of three years. At this while, Pravin's welfare was being taken care of by his maternal family.

D **[4]** It is evident that during the marriage the couple were not in harmony. There were problems within the matrimonial home and Pravin's father failed as a responsible husband. Gomathy has been abused and was placed in financial hardship. After Pravin's birth, Pravin's father seldom visited his then wife or the child. Since Gomathy's illness, Pravin's father insisted that Gomathy continue staying in her family home. Pravin's father had not provided for this wife nor the child during that **E** time. Gomathy's family took the sole responsibility of bringing up Pravin and also providing for Gomathy's medical expenses. Then Pravin's father filed a petition for divorce in August 2000 whilst his wife was very ill and her condition deteriorating. When she eventually died on 10 June 2001, Pravin's father did not even have the courtesy to attend her funeral nor bear her funeral expenses. Exactly two months after **F** Gomathy's death, Pravin's father remarried on 11 August 2001. From the time of Gomathy's death to the remarriage, not once did he worry enough about Pravin to want to at least visit the child who had lost his mother. Despite the court Order of 21 October 2002 (ie the consent order giving legal custody to Pravin's father and daily care and control of Pravin to the maternal grandparents), Pravin's father did not make even one payment of RM100 for his only son Pravin. There was not even a **G** gesture of gratitude shown to his late wife's family for having taken care of his son. It is in evidence that Pravin's father has not rebutted the fact that he had been irresponsible in not providing for his RM100.00 per month as ordered by the court. In fact, quite unashamedly, Pravin's father attempted to obtain the monthly allowance that Pravin was getting from the PERKESO Department as a result of his **H** mother's savings and death. Pravin's father apparently did so by stating that Pravin was living with him. Reference is made to para 5 and 6 of the 'afidavit jawapan Pariamma a/p Vellamuthian dated 30 November 2004 (lampiran 1)' (menjawab afidavit Jeyakumar Krishnan yang diikrarkan pada 15 Oktober 2004) Pravin's father has not rebutted this fact. The maternal aunt Pariamma helped to care for Pravin **I** from the time he was born. She subsequently got married on 22January 1994 to the first plaintiff, Jayakumar Karuppanan. Together they have provided for Pravin and taken care of his health, physical, educational and religious needs. Pravin refers to both of them as 'Appa' and 'Amma' respectively and has a very strong bonding with them. The maternal grandparents are two very simple individuals who had deep concerns for their grandson who has lost his mother. In law they have been entrusted

with the daily care and control of Pravin but in reality it has been the maternal aunt and uncle who has taken care of this child with the grandparents help. The family had no knowledge of the legal implications of a custody order. All they wanted was for Pravin to be happy.

[5] The plaintiffs make this application to rescind the order dated 20 May 2004 on the following grounds:

(i) that the child is of an age and is capable to express an independent opinion about his own needs;

(ii) that the wishes of the child must now be given due consideration.

I think the child's intention must now be given due consideration as the court was not given the opportunity to interview the child earlier nor was any welfare report tendered in court.

[6] The issue to be determined by the court is whether the order dated 20 May 2004 should be rescinded and the custody be now given to Jayakumar a/l Karuppanan and Pariamma a/p Vellamuthian, the Plaintiff's in this matter.

[7] Enclosure (7) is Pravin's father's summons in chambers with his supporting affidavit. This application is to strike out the plaintiff's parent application for custody, care and control of Pravin Kumar (encl (1)). I am of the opinion that encl (7) should be struck out instead for the following reasons: There is no question of res judicata, for this is a completely new suit with new parties and new circumstances. The earlier suit was between Pravin's father and the maternal grandparents which is as follows: Originating Summons Suit No S4–24–196 of 2002 Kuala Lumpur High Court (custody application) between *Jeyakumar Krishnan v Vellamuthian @ Vellayan a/l Periasamy and Sellamah a/p Sadayan*, whereas the present suit is between Pravin's maternal aunt and uncle and Pravin's father which is as follows: Originating Summons Suit No S8–24–1794 of 2004 Kuala Lumpur High Court (custody application) between *Pariamma a/p Vellamuthian and Jayakumar a/l Karuppanan v Jeyakumar Krishnan*. The main thrust of this application is that Pravin does not want to live with his father but he is being forced to do so by the court order dated 20 May 2004. This is based on a medical report by Dr Kasmini Kassim who has been fair in her evaluation. She does not for a moment state that the child should not be allowed to meet his father. To the contrary, she encourages meetings between Pravin and his biological father at Pravin's grandparents home (p 49, exh PV-9 encl 2 — affidavit of Pariamma a/p Vellamuthian affirmed on 23 August 2004). In her report Dr Kasmini states:

(i) Throughout the session Pravin answered to all my questions without prompting from his family members (para 1 Clinical Impression);

(ii) Pravin has been blessed with a loving and well caring maternal grandparents, maternal aunt and uncle throughout the six years of his life. The absence of his biological mother by death and biological father by his staying away from him did not cause a negative impact on Pravin. It is obvious that Pravin's maternal grandparents and maternal aunt and uncle have played their roles very well in caring for Pravin (Para 2 Clinical Impression);

(iii) To separate Pravin now from his maternal grandparents and maternal aunt who has developed strong and healthy emotional links with Pravin and then to make Pravin live with his father who has never formed emotional and physical links with Pravin (with attempts made very recently), will be detrimental to Pravin's physical and emotional development (para 3 Clinical Impression);

(iv) Pravin is still very young and it will not be in the best interest of Pravin with regards to his emotional and physical development, if he is forcibly made to live with his father at this juncture (para 4 Clinical Impression);

(v) In the meantime Pravin should remain in the care of his maternal grandparents and maternal aunt until such time that Pravin develops his trust and confidence with his biological father and when he is mentally prepared (para 2 Recommendation).

[8] I must state here that the court did not have the advantage of this report when a decision was earlier made to place Pravin in his father's custody. The emotional and psychological effect on Pravin is being forced to live with his father has not been highlighted to this court then.

[9] Section 88(2) of the Law Reform (Marriage and Divorce) Act 1976 states:

> In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —
>
> (a) to the wishes of the parent of the child; and
>
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

[10] The court should have regard to the parent's whishes and the child's wishes. The operative word 'and' should be interpreted conjunctively and disjunctively. In the previous custody decision, the court did not have the opportunity to consider both the parent's and child's wishes. Pravin will be seven years old on 9 April 2005. He was attending Joy Kindergarten and has performed well at his kindergarten. His principal had described him as a very intelligent, happy and active child (p 40, exh PV-9 encl 2 — Affidavit of Pariamma a/p Vellamuthian affirmed on the 23 August 2004). On 29 October 2004 at 9am. I interviewed Pravin and during the subsequent hearing on the 9 November 2004, I made it clear to Pravin's father that his child did not wish to live with him let alone see him. I told the father that was Pravin's genuine attitude towards his father. Pravin has clearly expressed his wishes and he is of an age to express an independent opinion. His principal at the kindergarten with whom he has been studying since 2002 has described him as an intelligent child. The child is precise, clear and focused on wanting to live with his maternal aunt and uncle. To quote Dr. Kasmini again:

> Pravin is still very young and it will not be in the best interest of Pravin with regards to his emotional and physical development, if he is forcibly made to live with his father at this juncture. (para 4 Clinical Impression).

[11] Referring to Dr Kasmini's assessment at p 49, exh PV-9 encl 2 — affidavit of Pariamma a/p Vellamuthian affirmed on 23 July 2004 Pravin does not wish to live with his father.

> When Pravin was asked about his father and whether he has met him, Pravin answered that he has met him when his father started coming to his grandparents' home recently. (para 3 Assessemnt on 26 July 2004).
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> When told that he should now live with his father and the lady, Pravin shook his head in disagreement and replied that he wants to stay with Pariamma, pointing to Pariamma at the same time. (para 4 Assessment on 26 July 2004).
>
> Pravin said he would bite his father's hands if ever his father is to take him away from his maternal grandparents and maternal aunt. (para 6 Assessment on 26 July 2004).
>
> I also conducted a separate session with Pravin alone with me and Pravin and reinstated his wish of not wanting to live with his father. He wants to live with his maternal aunt and uncle as much as possible. (para 7 Assessment on 26 July 2004).

[12] Pravin's reluctance can further be seen by his struggle not to be with his father on 29 October 2004 after the interview by me. There was a ruckus caused outside the court room and the end result was that this child Pravin Kumar ending up being hospitalised at Kuala Lumpur General Hospital from 29 October 2004 to 2 November 2004 (exh 'PV-2A' Affidavit Jawapan (lampiran 1) affirmed on 30 November 2004). It is observed that when Pravin was put to a test as to how much he loved his father by Dr Kasmini, the score was 'O' whereas his maternal aunt and uncle score '100'. This being the situation, it is my opinion that it is not in Pravin's interest to traumatize him by forcing him to live with someone, albeit that its his own biological father. Love and respect come naturally to a child and should not be forced on him.

[13] Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 provides, 'there shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody'. I think had the mother been alive, the presumption would most likely have been in her favour. It is a fact that since birth the child lived with his mother in turn had lived with her family. The child has been a child of the maternal family from birth. Therefore although the presumption no longer has a place in this case, this court must have regard to the undesirability of disturbing Pravin's life by changes in the care and control of this child's daily life at this point in his little blessed life. Any such changes would most likely traumatize and psychologically cause massive destruction to his emotions and general progress.

[14] With reference to s 100 of the Law Reform (Marriage and Divorce) Act 1976, ie when considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice. On 9 November 2004, I have allowed the plaintiff's application on encl (5) in that the court appoints a welfare officer to assist

this court in its decision on encl (1). Having recognized the importance of the welfare report in this case and having made the decision to request for a welfare report, it is only appropriate that a decision should not be made in the absence of such a report. An independent welfare officer would assess Pravin in his natural surroundings and with people battling for custody over him, there could not be a better guide than such a report. In the case of *Tan Chong Pay v Tan Swee Boon* [1997] 4 CLJ 625, where the court had accepted guidance and the confidential report of the social officer and stated 'the reports of the Welfare Department were valuable sources of information and assisted me in coming to a fair and speedy decision'. I am of the opinion that in considering the welfare of the child, the word 'welfare' connotes a process whereby, all the relevant facts, relationships, claims and wishes of parents, wishes of the child, risks, choices and other circumstances should be taken into account and weighed, the course to be followed in the interests of the child's welfare comes as a matter of course. These valuable information can be obtained with the assistance of a welfare officer's report. In the *Tan Chong Pay*'s case the court said:

> At a glance it is imperative that before a custody order is made the court must accede to the fundamental requirement that the paramount consideration is the welfare of the child. When the law enunciates that legal expectation, it must follow that that expectation must not be speculative, promissory, or even unfounded. It must be real, substantive, immediate and certainly lasting. Since the law speaks of the welfare of the child, then the benefits and advantages must be geared towards his direction and not the father, mother, another sibling or for that matter the applicant. To exploit these personalities for the infant's welfare and benefit must be the norm rather than the exception. Anything that flows from the infant must be construed as coincidental and God's gift to the recipient. To be anywhere close to the optimum as envisaged by the law, which is a tall order, the only reasonable approach is to gather and consider all viable factors that may assist the court in coming to a decision that will eventually result in the child developing well emotionally, mentally, socially and psychologically.

[15] In the present case, Pravin lives between his uncle and aunt on the one hand and his grandparents and other maternal siblings on the other hand. Pravin's maternal aunt Pariamma works part time and during her work period she leaves Pravin with his maternal grandparents. He is taken to school and brought home by his grandparents. His maternal aunt and uncle (the plaintiffs) attend to his educational needs by buying him reading materials, school books, paying for his tuition fees, attending school regularly to follow through his progress and teaches him at home. They spend as much time as possible in meeting his emotional and physical needs. On Fridays, they take him to temple without fail and teach him Hindu religious rites and hymns. Pravin is covered with medical and educational insurances. The money that he receives from PERKESO goes into strict savings for his future. It is being held on trust for him (see para 5 and 6 of the 'Afidavit Jawapan Pariamma a/p Vellamuthian dated 30 November 2004 (Lampiran 1)' (menjawab affidavit Jeyakumar Krishnan yang diikrarkan pada 15 Oktober 2004). Pravin's father has not rebutted this fact. In this case Pravin is happy, well taken care of and most importantly he has a home with the plaintiffs. In the case of *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, it was said that (at p 192):.

> It is well established that in an application for the custody of a child the court will in exercising its discretion regard the welfare of the child concerned as the first and paramount

consideration. It is equally established that this does not mean that the court will not take other relevant factors into consideration. Indeed in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. But always it is the welfare of the child which is of paramount importance

[16] In *Sivajothi K Suppiah v Kunathasan Chelliah* [2000] 6 MLJ 48, the phrase 'paramount consideration' and 'welfare of the child' were judicially interpreted and consist of several factors. The relevant factors were considered by me in that case and those considerations and requests should equally apply to the present case. There I quote and made specific reference to Raja Azlan Shah CJ (as DYMM was then) in *Mahabir Prasad v Mahabir Prasad* where it was said that 'the overriding consideration ahs to be the welfare of the children' and his Lordship Raja Azlan Shah CJ (as DYMM then was) held:

In short the learned judge given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate.

The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, can be effective only if it coincides with their welfare.

[17] In s 88(1) of the Law Reform (Marriage and Divorce) Act 1976, the court may at any time by order place a child in the custody of his or her father or mother, or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person. I would therefore hereby grant order in terms of the application for the following reasons:

(a) The plaintiffs are appropriate and suitable custodians in this application;

(b) They are relatives of the child; they are the maternal aunt and uncle;

(c) The maternal aunt has assisted in taking care of Pravin since birth;

(d) The plaintiffs are supported by their parents and siblings in caring for and nurturing Pravin;

(e) Since Pravin's mother's death, his maternal family has given him the emotional, psychological and financial support as opposed to his natural father;

(f) His father had rarely visited him since birth;

(g) His father has not provided him with emotional or financial support;

(h) His father has not one day seen to Pravin's educational needs;

(i) His father has failed as a responsible father to Pravin;

(j) His father had relinquished his responsibility of care and control of Pravin's daily life through a consented court order of 21 October 2001 after his marriage to his second wife on 11 August 2001 which took place shortly after the death of his first wife (Pravin's mother) on 10 June 2001;

(k) But now he returns to this court to argue that this is the appropriate time for him to take over Pravin's life as Pravin would be susceptible to receive his guidance (see para 13(b) of Jeyakumar Krishnan's (Pravin's father) affidavit affirmed on the 15 October 2004 which says as follow, '… dan sekarang adalah masa yang tepat untuk anak saya membesar di bawah penjagaan saya kerana sesuai bagi pembentukkan mindanya untuk menerima tunjuk ajar daripada saya'). This just goes to show how the defendant had decided on a short cut to a 'ready-made-easy-to-manage child'. It reflects his selfish attitude of wanting to reap from another's success in bringing up a child. Had he taken the child away immediately after his late wife's death, his intentions would have been viewed as noble;

(l) a child's education begins from the moment he finds his way out of his mother's womb and not at some convenient time to the father.

(m) This court has considered the following questions:

(i) (i) Where was the father from the time this child Pravin Kumar came into this world?

(ii) (ii) What has he responsibly done for his child?

(iii) (iii) Without wishing to fault him for remarrying, where was he when his child needed him most when that very child had lost his mother?

(n) Pravin Kumar is not an object to be treated like a 'yoyo'. He is sensitive, he has feelings, he has expressed himself, he wanted to be heard by me, he feels happy to have been given that opportunity by me, he wants his wishes to be respected, he wants the adults around him to recognise that he too has his rights and most of all he wants to be treated like a human being;

(o) He detests the way his father grabbed and hurt him in court despite expressing his wishes that he did not want to return with his father. He fears of a similar incident in court. The mention of his father and court makes him physically ill with fever. Does this child need any more trauma in his life?

(p) Pravin wants to live with his maternal aunt and uncle;

(q) He does not wish to go anywhere with his father alone. In the case of *Churchard v Churchard CA* (1984) FLR 635, the parties had two children and custody of the children were given to the mother whereas the father had access. The father applied to commit the mother to prison for breaching the access order. His Lordship Ormrod LJ had the following to say:

> So far as access is concerned, the time has come, the judge thought, and I think rightly, to say 'enough is enough'. Enough attempts and struggles have been gone through in the last 18 months or so and the only way of dealing with the case is to accept the situation which has come out for whatever reasons. It does not matter what the reason for their behaviour is. It cannot be in their interest that all the

cumbersome machinery of the law should be put into operation in order to make boys of 10 and 8 do what they refuse to do. It can only be slightly ridiculous.

The only thing in the circumstances is for the parents to behave like adults and accept the situation which has come about for whatever reasons. The law is not omnipotent. Frequently, as we all know there are situations which courts have to accept. All they can do is to impose consequences. In this particular case there are no consequences that the court can impose even if it thought fit. The reality has to be acknowledged therefore. Reality in this case is that the children cannot be compelled to see their father in the present circumstances.

Plaintiffs' application allowed.

Reported by K Krishnan